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NO. 93-1633

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM O. SWAN AND
KATHLEEN R. SWAN,

Petitioners,

v.

KURT S. PETERSON, WARDEN OF WASHINGTON
CORRECTION CENTER, ET AL.,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. ADOPTING THE SWANS' CONFRONTATION CLAUSE ARGUMENTS BASED ON IDAHO v. WRIGHT WOULD NOT REQUIRE THE ESTABLISHMENT OF A NEW RULE IN VIOLATION OF TEAGUE v. LANE.

Respondents allege that in judging the reliability of the hearsay statements under Wright's "totality of the

circumstances" test, Idaho v. Wright, 497 U.S. 805, 820 (1990), the Ninth Circuit properly ignored the fact that Rachel "did not understand the obligation to tell the truth" and "did not have sufficient memory to speak truly about past events"; the fact that Conradi and Bratvold were predisposed to find abuse and had no training in neutral questioning; and the fact that other evidence contradicted the allegations of abuse. Respondents seek to evade review by further alleging that the consideration of any of this evidence would constitute a "new rule" under this Court's decision in Teague v. Lane, 489 U.S. 288 (1989).

Under Teague, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," or "[t]o put it differently, a case announces a new rule if the result was not dictated by

precedent existing at the time the defendant's conviction became final." Id. at 301. In their petition, the Swans do not ask this Court to break new ground or impose any new obligations on either the States or the Federal Government. Rather, the Swans merely request a faithful application of Wright's "underlying principle." Wright v. West, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring).

Under Idaho v. Wright, hearsay admitted pursuant to a non-traditional hearsay exception must possess particularized guarantees of trustworthiness "drawn from the totality of the circumstances that surround the making of the statement **and** that render the declarant particularly worthy of belief." 497 U.S. at 820 (emphasis added). This does not mean that a judge should only look to evidence tending to

indicate trustworthiness and should ignore evidence indicating untrustworthiness. Wright's true focus is on reliability. It mandates a weighing of factors supporting trustworthiness against those indicating untrustworthiness.

In this case, the circumstances that surround the making of the children's statements necessarily include who was doing the questioning, the questioner's potential for bias, and how the questioning was conducted. The circumstances that render the children particularly **unworthy** of belief include the existence of evidence which tends to show that their statements were false and Rachel's inability to distinguish fact from fiction. The Ninth Circuit erred when it refused to consider these factors which show that the children's hearsay statements were **unreliable**. Indeed, the rule applied by the Ninth Circuit would

logically allow the admission of a blind man's hearsay statement describing what he saw as told to and reported by a deaf man, where such statements were made spontaneously and without motive to fabricate, the blind man was not prone to lying and the allegations were consistent over time. As Abraham Lincoln said, "nothing should be implied as law which leads to unjust or absurd consequences." Louise Bachelder, Abraham Lincoln: Wisdom and Wit 25 (1965).

That the Swan's request for a faithful application of Wright implicates no "new rule" is further demonstrated by the opinion in Wright itself. As the New Jersey Supreme Court explained:

> The United States Supreme Court in Idaho v. Wright noted with approval the conclusion of the Idaho Supreme Court that the failure to video tape interviews with alleged child victims, the use of blatantly leading questions, and the presence of an interviewer with a

> preconceived idea of what the child should be disclosing, in addition to children's susceptibility to suggestive questioning, all indicate the potential for the elicitation of unreliable information.

State v. Michaels, 642 A.2d 1372, 1378 (N.J. 1994) (internal citations omitted). Thus, in Wright, this Court recognized the Constitutional importance of examining evidence indicating the **untrustworthiness** of hearsay statements offered into evidence pursuant to non-traditional exceptions.

Indeed, the Ninth Circuit's decision can only be viewed as an aberration in light of the decisions of other courts correctly applying Wright. In United States v. Accetturo, 966 F.2d 631 (11th Cir. 1992), the Eleventh Circuit, after discussing the factors supporting the reliability of a hearsay statement, continued: "There was also some contrary evidence; there were some indications that

[the] statement was not trustworthy." Id. at 636. After examining that evidence, the court "carefully weighed" it against the evidence suggesting trustworthiness to reach a final conclusion about admissibility. Id.

The strongest evidence that the Ninth Circuit deviated from Wright comes from the Ninth Circuit itself. Just last month, a Ninth Circuit panel granted a writ of habeas corpus to vindicate a Confrontation Clause violation far less egregious than the one that occurred in this case. The panel noted:

> Wright forbids recourse to other evidence to corroborate the trustworthiness of the hearsay offered; **Wright does not forbid recourse to other evidence that confirms the presumptive unreliability of the hearsay.**

Webb v. Lewis, 1994 WL 455607 at *6 (9th Cir. August 24, 1994).

One of the underlying principles behind Teague was to prevent the "harm

caused by the failure to treat similarly situated defendants alike[:] such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." 489 U.S. at 315 (citations omitted). This principle militates in favor of granting certiorari in this case for, given the Ninth Circuit's recent opinion in Webb, the Swans have clearly received inequitable treatment.

Accordingly, this Court's review of the Ninth Circuit's application of Wright is not barred by Teague.

II. TEAGUE v. LANE DOES NOT PRECLUDE THIS COURT FROM DECIDING WHETHER THE CONFRONTATION CLAUSE PROHIBITS A STATE FROM CONVICTING A CRIMINAL DEFENDANT SOLELY ON THE BASIS OF HEARSAY.

Amicus' argument that a criminal defendant cannot be convicted solely on the basis of hearsay is also properly before this Court. First, contrary to the

Respondent's allegations, the State's only evidence of the Swan's guilt was presented in the form of hearsay. The Ninth Circuit left this question unresolved but noted that "the medical evidence regarding [Beth Anne] and also, to a lesser extent, [Rachel's] play with an anatomically correct doll" was non-hearsay evidence potentially supporting the Swan's conviction. Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993). However, the Ninth Circuit's opinion describes the medical evidence as "merely equivocal." Id. at 1385. Furthermore, the evidence of Rachel's out of court play with a doll was offered to show that the Swans committed the alleged acts; thus, it was also hearsay. See, e.g., State v. Townsend, 635 So.2d 949, 959 (Fla. 1994); Hutchcraft v. Roberts, 809 F. Supp. 846, 851 (D. Kan. 1992).

Second, this Court would not be violating Teague by concluding that a criminal defendant cannot be convicted solely on the basis of hearsay. While this Court has never explicitly adopted this rule, it is dictated by Warzower v. United States, 312 U.S. 342 (1941) and Opper v. United States, 348 U.S. 84 (1954). The rule is simply a variation of the principle that certain forms of evidence, while admissible, are not sufficient to provide the sole basis for a conviction beyond a reasonable doubt. In Warzower, this Court explained that a confession must be corroborated as to "each element of the corpus delicti." 312 U.S. at 346. Similarly, in Opper, the Court stated that:

> Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination.

348 U.S. at 90. Because of the inherent unreliability of admissions -- just like the presumptive unreliability of non-traditional hearsay -- the Court held that "the Government must introduce substantial independent evidence which would tend to establish the trustworthiness of the statement." Id. at 93.

Moreover, under Teague, "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies," no new rule is implicated. Wright v. West, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring). The only distinction between this case and Warzower and Opper is that hearsay, instead of other presumptively unreliable forms of evidence like a confession or an admission, constituted the prosecution's sole case against the Swans. The

underlying constitutional principle is the same: some evidence, while admissible, is insufficiently reliable by itself to sustain a conviction.

Even if the rule that a criminal defendant cannot be convicted solely on the basis of hearsay would be "new," this Court may still grant certiorari because such a rule would fall within Teague's second exception for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990) (internal quotation marks omitted). This Court in In re Winship, 397 U.S. 358, 364 (1970), held that the Constitution requires proof beyond a reasonable doubt to convict a criminal defendant. This decision was "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than

to let a guilty man go free." Id. at 371 (Harlan, J., concurring).

The same Constitutional values underlie the principle that a criminal defendant cannot be convicted solely on the basis of hearsay. This rule would be "central to an accurate determination of innocence or guilt. . ." Teague, 489 U.S. at 313. Indeed, it would go to the very heart of that determination.

The fundamental nature of such a rule is generally recognized by prosecutors. For example, one Assistant United States Attorney, when asked by a Seventh Circuit judge if hearsay alone would be sufficient to convict a criminal defendant, responded:

> If I were a prosecutor, I wouldn't give it to the grand jury. If I was a grand juror, I wouldn't indict it. If I were a district court judge, I'd grant the Rule 29 motion [for judgment of acquittal]. If I were a juror, I would vote to acquit, and if I was a member of this

> court, I'd vote to reverse for sufficiency.

United States v. Martinez De Ortiz, 907 F.2d 629, 638 (7th Cir. 1990) (en banc) (Cudahy, Circuit Judge, concurring).

In sum, Teague does not bar this Court from considering whether a criminal defendant can be convicted solely on the basis of hearsay.

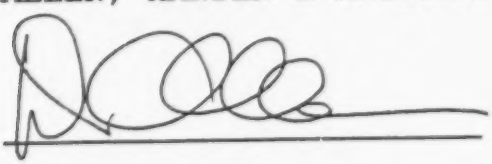
CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 21st day of September, 1994.

Respectfully Submitted,

ALLEN, HANSEN & MAYBROWN,



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